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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 22.

EVELYN C. GARDNER,

Petitioner,

v.

PANAMA RAILROAD COMPANY, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONER.

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN APPEAL No. 13259 IN ADMIRALTY.

BRIEF FOR PETITIONER.

Opinions Below.

The opinion of the Court of Appeals for the Fifth Circuit (R. 31-32) is reported in 185 F. 2d 730. The opinion of the United States District Court for the District of the Canal Zone, dismissing the libel on the ground of laches appears at R. 19-23.

Jurisdiction.

A writ of certiorari was granted on May 21, 1951 (R. 35), pursuant to 28 U. S. Code 1254 (1).

Question Presented.

Whether the Courts below erred in dismissing the libel on the ground of laches.

Statement.

Without a trial on the merits, petitioner has had her libel dismissed on the ground that laches in admiralty was inflexibly controlled by the limitation applicable to actions at law, and that "no facts or circumstances in her favor can prevent the running of the statutory limitation of one year" (R. 23).

The facts bearing on laches are not in dispute, being a matter of court record specifically stipulated by the parties (R. 18).

First Action Against Respondent Dismissed on the Ground That Federal Tort Claims Act Provided Exclusive Remedy.

Petitioner was seriously injured on the high seas on December 3, 1947, while a passenger on board a vessel owned and operated by respondent, the Panama Railroad Company (hereinafter sometimes referred to as "the Company"), then a New York corporation. The Company, originally incorporated in 1849, has been owned by the Government of the United States since 1905, and was reincorporated by Federal statute in 1948.*

* As was true under its New York charter, by the statutory reincorporation of 1948, Panama Railroad Company was empowered to "sue and be sued in its corporate name" (Public Law 808, 80th Congress, June 29, 1948, Ch. 706, 62 Stat. 1075, amending §248 [d] of Tit. 2 of the Canal Zone Code). See U. S. Code Congressional Service, 80th Congress, Second Session, 1948, Legislative History, vol. 2, pp. 2157, 2159.

Meanwhile on April 10, 1948 petitioner instituted a civil action for damages at law (No. 2807) against the Company in the United States District Court for the Canal Zone (R. 10). The Company pleaded that it was an agency of the United States, that by the terms of the Federal Tort Claims Act of August 2, 1946, the exclusive remedy for torts by a federal agency (except those exempted) was by suit against the United States under that Act (60 Stat. 842; 28 U. S. C. 2671 and 2679 (formerly Sections 941 and 2680), and that accordingly a suit could no longer be maintained for its torts directly against the Panama Railroad Company (R. 10). A motion to strike this defense was denied, and the complaint was dismissed on the Company's motion on October 7, 1948 (R. 4, 10).

Timely Action Against the United States Instituted Under the Federal Tort Claims Act.

On November 29, 1948—still within the one-year period of limitations—petitioner instituted a civil action No. 2930 against the United States in the same District Court for the same damages, on the basis of the Federal Tort Claims Act. An answer joining issue on the merits was filed on behalf of the United States (R. 10, 11).

Amendment of the Federal Tort Claims Act in Relation to Claims Involving the Panama Railroad Company.

While action No. 2930 was pending—and more than one year after the injury complained of—Congress enacted Public Law 172 on July 16, 1949 (63 Stat. 440, 28 U. S. C. 2680 (m), which amended the Tort Claims Act by simply adding a subparagraph exempting from the purview of the Act:

> "(m) Any claims arising from the activities of the Panama Railroad Company."

The Congressional Committee reports establish that this amendment was designed to remove the bar of the Federal Tort Claims Act to direct actions against the Panama Railroad Company, and once again make it "subject to suit on all claims, tort as well as contract, in the same manner as any private corporation." (U. S. Code Congressional Service, 81st Congress, First Session, 1949, vol. 2, p. 1589). Included in the Committee reports, are letters from the president of the Panama Railroad Company (the Governor of the Canal Zone), the Secretary of War, and the Department of Justice, urging the amendment on the ground that since the Panama Railroad Company was engaged in various commercial activities and operated out of income and not from appropriated funds, it was unfair to seamen, longshoremen and others dealing with the Company, as well as an inconvenience to the Company, to subject its tort litigation to restrictions appropriate only in situations involving governmental immunity:

> "The varied activities of the Company, which include the operation of a railroad across the Isthmus of Panama with terminals in the Republic of Panama, the operation of a steamship line between the Isthmus and American ports, the operation of hotels and commissary stores, and the operation of related commercial enterprises, are not those to which the principle of governmental immunity to suit should be applied. * * * Before the enactment of the Federal Tort Claims Act, the Company was subject to suit on all claims, tort as well as contract, in the same manner as any private corporation. As a ship operator, it was subject to suit in the same manner as any shipping company * * *" (U. S. Code Congressional Service, 81st Congress, First Session, 1949, vol. 2, p. 1590).

Significant also is the following statement from the President of the Company contained in the letter of the

Secretary of the Army, and repeated again in the letter from the Department of Justice (p. 1594):

> "Since it is engaged in business as a common carrier and in other commercial enterprises, the basic policies underlying governmental immunity from suit do not apply to the Company, and it is desirable if not essential to *continue* unimpaired the ability of the Company to effect prompt settlement of meritorious claims and the amenability of the Company to suit in ordinary course" (U. S. Congressional Service, 81st Congress, First Session, 1949, vol. 2, p. 1593). (Italics ours.)

Dismissal of Petitioner's Federal Tort Claims Action.

Upon the adoption of Public Law 172, the United States moved to dismiss the then pending action on the ground that the amendment withdrew the remedy against the United States under the Federal Tort Claims Act for torts committed by the Panama Railroad Company. The Court granted the motion, and entered judgment dismissing that action on October 14, 1946, holding that it no longer had jurisdiction to entertain suits against the United States for such torts (R. 11).

Present Libel in Admiralty and Its Dismissal on the Theory of Laches.

On October 19, 1949, five days after the dismissal of the Federal Tort Claims action, petitioner filed the present libel in admiralty against the Panama Railroad Company (R. 11).

The Company filed a plea to the jurisdiction (R. 4-9), asserting that Public Law 172 had not only withdrawn the remedy against the United States, but had left peti-

tioner without any right against anyone. The District Court overruled this contention, holding that the amendment to the Federal Tort Claims Act restored petitioner to the same rights to sue the Company that she would have had if the Federal Tort Claims Act had never applied to claims arising from the Company's activities (R. 10-14).

The Company then answered averring laches, on the sole ground that more than one year had elapsed since injury occurred and that the Canal Zone statute of limitations for civil actions at law was one year (R. 17).

This defense came on for separate hearing. No evidence was produced by the Company suggesting prejudice; it relied on the bare fact that more than one year had elapsed between the date of the injury and the institution of the libel in admiralty (R. 21). By stipulation the entire record of the previous actions was made part of the case (R. 18). The District Court held that laches was controlled by the statute of limitations, regardless of the circumstances, writing (R. 23):

> "Notwithstanding the dismissal of Actions 2807 and 2930, libelant in this case had the right until December 2, 1948, to proceed either in common law or by admiralty, but such right expired thereafter. In view of that failure, no facts or circumstances in her favor can prevent the running of the statutory limitation of one year."

It is difficult to understand the Court's statement that libelant "had the right until December 2, 1948, to proceed either in common law or by admiralty" in view of that Court's previous holdings—in connection with the dismissal of Action 2807 and in its finding in this action—that no suit could be maintained against the Company while the Federal Tort Claims Act was applicable (R. 10-11). As the Federal Tort Claims Act applied during the entire

one-year period until its amendment in 1949, and as the Court expressly found that during this period "the remedy for enforcement of libelant's cause of action was confined exclusively against the United States" (R. 11)—there is no basis for any suggestion of laches.

Apparently the District Court, for purposes of the statute of limitations, considered the situation as if the Federal Tort Claims Act had never existed, and then treated the statute so construed as equivalent to laches in admiralty.

The judgment below was affirmed by the Court of Appeals on the ground of laches, in an opinion which does not discuss the problem (R. 31-33).

POINT I.

The Courts below erred in dismissing the libel on the ground of laches.

The diligence of the petitioner, her persistent efforts to vindicate her rights by action, and the absence of prejudice to the respondent are apparent from the record.

The Courts below held as a matter of law that laches in admiralty must be conclusively determined against the claimant by the passage of one year, regardless of the "facts or circumstances in her favor" (R. 23).

This was clearly error. It is well settled that in admiralty the statute of limitations is not controlling, and that the only time bar is that based on the principle of laches, which depends upon the equitable circumstances of the particular case, and not on mere lapse of time.

In *Young v. The Steamboat "Key City"*, 81 U. S. (14 Wall.) 653, this Court, reversing a dismissal below on the

ground of laches, pointed out that it was settled doctrine in admiralty:

> "That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that delay which will defeat such suit must in every case depend on the peculiar equitable circumstances of that case."

This principle has been repeatedly enunciated in subsequent admiralty cases:

> "Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay. Its existence depends upon the equities of the case, and not merely upon the lapse of time" (*United States* v. *Alex Dussel Iron Works, Inc.*, 31 F. 2d 535 at 536 [C. C. A. 5, 1929]).

Accord:

> *Loverich* v. *Warner Co.*, 118 F. 2d 690, 693 (C. C. A. 3, 1941), cert. den. 313 U. S. 577.

See also:

> *Lincoln* v. *Cunard Steamship Co.*, 221 Fed. 622 (C. C. A. 2, 1915);
> *McGrath* v. *Panama Railroad Co.*, 298 Fed. 303 at 304 (C. C. A. 5, 1924).

Laches means lack of diligence or acquiescence—something completely negatived in the instant case.

> "But the essence of laches is not merely lapse of time. It is essential that there be also acquiescence in the alleged wrong or lack of diligence in seeking a remedy" (Brandeis, J., in *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483 at 488-489).

While the failure of a plaintiff to bring *any* suit until after the expiration of the common law period of limita-

tions may be deemed indicative of laches *in the absence of adequate explanation*, reference to the statute "is only an analogy and not a rule" (*Loverich* v. *Warner Co.*, 118 F. 2d at 693).

What the Courts below did was to apply the statute of limitations by mechanical rule, disregarding the undisputed record facts conclusively disproving actual laches.

As recently stated by this Court in *Holmberg* v. *Armbrecht*, 327 U. S. 392, 396, overruling a finding of laches (Frankfurter, *J.*):

> "Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that 'laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.' *Galliher* v. *Cadwell*, 145 U. S. 368, 373; see *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 488-89."

As further stated in the same case (p. 396):

> "Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. See *Russell* v. *Todd*, *supra* (309 U. S.) at 289."

In the instant case, far from sleeping on her rights, petitioner vigorously attempted to prosecute them by timely litigation. She was frustrated, in the only remedy then available, by a statutory amendment, adopted by Congress at the request of this Company, with the pur-

pose of restoring the remedies against Panama Railroad Company.

Even where a plaintiff has long neglected to adopt an available remedy—and here there was no such neglect—such delay will not constitute laches where the plaintiff has evidenced diligence by litigation brought in the interim.

In *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, the claim of laches was raised in a suit brought 22 years after the wrong. In the interim, plaintiff and his associates had maintained several other inappropriate suits, resulting in dismissals. As the proper remedy had been available at all times, defendant urged laches. Overruling the contention, this Court pointed out that the plaintiff's conduct showed diligence, and that, absent prejudice to the defendant, the passage of time was not a bar:

> "Nor does failure, long continued, to discover the appropriate remedy, though well known, establish laches where there has been due diligence."

Similarly in *Lincoln* v. *Cunard Steamship Co.*, 221 Fed. 622 (C. C. A. 2d 1915), almost two years after the accident, libellant began an action at law in the District Court, on the assumption that he was an American citizen. Upon dismissal for lack of diversity—4 years after the injury—he brought an admiralty suit. The Circuit Court of Appeals refused to dismiss on the ground of laches, pointing out that the analogy of the statute of limitations is not followed in admiralty where the circumstances "may be regarded as exceptional."

If, as was true in these cases, a long delay resulting from a mistake by plaintiff or his counsel will not constitute laches, where diligence is shown by the prosecution of erroneous litigation, there can be no basis for asserting laches where, as here, petitioner, constantly

endeavoring by litigation to vindicate her claims, had pending a timely action which, without her fault, was terminated by the most "exceptional" circumstance of a statutory amendment.

The case of *McGrath* v. *Panama Railroad Co.*, 298 Fed. 303 (C. C. A. 5, 1924), relied upon below, actually supports our position. There the libelant, apparently without any prior suit, had instituted his libel after the running of the limitation at law. The only explanation for the delay was the assertion that counsel had thought a longer statute of limitations applicable. The Court rejected this excuse, doubtless feeling that similar subjective excuses for non-action might be advanced in almost any case. However, Judge Grubb in his opinion expressly recognized:

> "Courts of admiralty are not, however, bound by common law limitations, but adopt them by analogy, unless equitable reasons exist for not doing so" (p. 304).

Here the Courts below treated themselves as disabled from considering equitable circumstances (R. 23).

The present case differs in a number of vital respects from the *McGrath* cases: (1) Petitioner established her diligence by instituting two actions prior to the expiration of the one-year period; (2) Petitioner could not have maintained a libel in admiralty against the Company within the one-year period in view of the then applicable provisions of the Federal Tort Claims Act; (3) Petitioner's timely action under the Federal Tort Claims Act—the only remedy then available—was frustrated by the exceptional circumstance of a statutory amendment, designed by Congress to restore the situation existing prior to the Federal Tort Claims Act; (4) As soon as petitioner's Federal Tort Claims action was dismissed, she immediately instituted the present libel; (5) It is doubtful whether even at law the statute of limitations ran in

favor of the Company during this period as "the right to sue was suspended by the Act of the Government"* (*Hanger* v. *Abbott*, 6 Wall. 532 at 541).

But whatever the statute of limitations may be at law, it is plain that here no laches—acquiescence or lack of diligence—existed. On any theory of laches the exceptional circumstances and the inequity of depriving the libelant of a trial on the merits are clear.

The judgment below not only produced an injustice, but was reached by a disregard of established and basic principles of equity and admiralty law.

POINT II.

There was jurisdiction over the subject matter.

The Company, in opposing the writ of certiorari, indicated that it would urge that dismissal should have been granted on the ground of "lack of jurisdiction over the subject matter". This contention was expressly overruled in an opinion by the District Court (R. 10-14), and the Court of Appeals deemed it unnecessary to pass upon the point (R. 32-33).

The Company's position is that when Congress passed Public Law 172 amending the Federal Tort Claims Act so as to withdraw from its purview torts committed by the Panama Railroad Company, the result was to leave persons injured by that corporation (including seamen, longshoremen and passengers) without any remedy at all.

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* This common law exception to the running of the statute is embodied in the Canal Zone Code, Tit. 4, §107: "When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

This would subvert the sole and expressed purpose of Public Law 172 to restore the former situation by which "the Company was subject to suit on all claims, tort as well as contract, in the same manner as any private corporation". Committee Report (U. S. Code Congressional Service, 81st Congress, First Session, 1949, Legislative History, Vol. 2, p. 1590).

Prior to the Federal Tort Claims Act the Company, like any other corporation, was concededly subject to suit for its torts (*Panama Railroad Company* v. *Minnix*, 282 Fed. 47), and the reincorporation of 1948 expressly prescribed that it could be sued in its corporate name (Public Law 808, 80th Congress, June 29, 1948, Ch. 706, 62 Stat. 1075, amending Canal Zone Code, Tit. 2, §248 [d]).

The Federal Tort Claims Act, in providing a remedy against the United States for torts of its agents and agencies, by definition included government owned corporations (28 U. S. Code 2671, formerly 941). So long as the statute applied to the Panama Railroad Company, the right to pursue ordinary remedies by direct suit against the Company was suspended, because of the provision that the remedy against the United States was exclusive on those "claims which are cognizable under section 1346 (b) of this title" (28 U. S. Code 2679).

When Congress, by the adoption of Public Law 172, made claims involving the Panama Railroad Company no longer "cognizable" under Section 1346 (b) of Title 28, it removed the only bar to suit against that Company for its own torts. This did not create a new cause of action but simply restored the old remedy, in place of the remedy given by the Federal Tort Claims Act. (See *Wiltse v. United States*, 74 F. Supp. 786 at 787.) The intention of Congress to continue the Company subject to suit is plain. (See *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 389-390.)

The president of the Company in his letter urging the adoption of Public Law 172, after elaborately pointing out the unfairness to litigants of restricting them to the remedies of the Federal Tort Claims Act, concluded that the adoption of the amendment was essential "to continue unimpaired * * * the amenability of the Company to suit in the ordinary course" (U. S. Code Congressional Service, 81st Congress, First Session, 1949, Vol. 2, p. 1592).

Yet now counsel for the Company contend that this amendment, far from continuing the amenability of the Company to suit, not only deprived litigants of their remedy against the United States but also of their right against the Company.

The District Court properly overruled this contention.

CONCLUSION.

The judgment of the Courts below should be reversed, with costs, and the case remanded for trial on the merits.

Respectfully submitted,

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